Tentative Rulings for June 22, 2010
Departments 97A, 97B, 97C & 97D

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

08CECG01433 ***Douglas Chaffer v. Frank Bradford, et al.*** **(Dept. 97D)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

06CECG03664 ***Shanahan v. Vance et al.*** **is continued to June 30, 2010 at 3:30 p.m. in Dept. 97D**

(Tentative Rulings begin at the next page)

(5)

Tentative Ruling

Re: ***Courtyard Financial, Inc. v. J.P. Morgan Chase Bank, N.A., et al.***
Superior Court Case No: 09 CECG 00661

Hearing Date: June 22, 2010 (**Dept. 97C**)

Motion: Demurrer to the Third Amended Complaint

Tentative Ruling:

To continue the hearing to July 28, 2010 at 3:30 p.m. in Dept. 97C to allow for supplemental briefing as requested infra. Supplemental briefing shall be filed simultaneously on July 8, 2010. No replies or rebuttal will be permitted. Service on the opposing party shall be via fax or hand delivery.

Explanation:

Choice-of-Law

The Court notes that the "Correspondent Origination and Sales Agreement--Closed Loan Purchase" states at Section 7.8 Governing Law: This Agreement and the interpretation of its terms shall be governed by the laws of the State of New Jersey without giving effect to its principles of conflicts of law. THE PARTIES WAIVE THEIR RIGHTS TO A JURY TRIAL IN ANY ACTION UNDER THIS AGREEMENT." This raises a choice-of-law issue that the parties have not previously addressed. In general, California courts handles choice-of-law clauses the same as forum-selection clauses. Accordingly, the law of the state or country designated in the contract will be applied by California courts unless:

—there is "no reasonable basis" for the parties' selection; or

—the law is contrary to a "fundamental policy" of California. See *Nedlloyd Lines B.V. v. Sup.Ct. (Seawinds)* (1992) 3 C4th 459, 464–465.

For example, in the case of *Guardian Sav. & Loan Ass'n v. MD Assocs.* (1998) 64 CA4th 309, 315–316, a Texas lender loaned money to Texas borrower secured by California real estate. The loan contract contained a choice-of-law provision designating the law of Texas as governing. Although Texas law allows deficiency judgments and California law does not (see CCP § 580b), the choice-of-law provision was upheld. A deficiency judgment did not run contrary to the fundamental public policy of California because the transaction involved Texas

parties and Texas had a legitimate interest in ensuring their justified expectations were met. In any event, the analysis of a choice-of-law question involves three steps:

—determine whether the laws of each state *actually differ;*

—if so, determine whether each state *has an interest* in having its law *applied to this case* (a "true" conflict of laws); and

—if so, determine "which state's interests would be *more impaired* if its policy were subordinated to the policy of the other state." See *People ex rel. DuFauchard v. U.S. Fin'l Mgmt., Inc.* (2009) 169 CA4th 1502, 1520.

As a result, the Court requests further briefing as to whether New Jersey law should govern in interpretation of the contract as well as the causes of action for fraud and promissory estoppel.

Reconsideration of the Ruling on the First Cause of Action

The Defendant has generally demurred to the First Cause of Action alleging breach of contract on the grounds that it fails to state sufficient facts to constitute a cause of action. The Plaintiff argues that the demurrer to the breach of contract cause of action was overruled on October 1, 2009 and that the cause of action cannot be attacked again. In general, after a demurrer is sustained with leave to amend and the plaintiff files an amended complaint, it is treated as a *new* pleading. Defendant is therefore entitled to respond to the amended pleading as he or she did to the original—including another demurrer. See *Clausing v. San Francisco Unified School Dist.* (1990) 221 CA3d 1224. But, where a prior demurrer was sustained as to some causes of action but overruled as to others, and plaintiff then amends the complaint, a defendant *may not demur again* on the same grounds to those portions of the amended pleading to which an earlier demurrer was *overruled*. See *Bennett v. Suncloud* (1997) 56 CA4th 91, 96, fn. 1. Instead, a defendant should move for reconsideration within the confines of CCP § 1008. However, there are recent cases that permit successive demurrers. See *Pavicich v. Santucci* (2000) 85 CA4th 382, 389, fn. 3 and *Pacific States Enterprises, Inc. v. City of Coachella* (1993) 13 CA4th 1414, 1420, fn. 3. Moreover, the Court has the inherent authority to reconsider its interim rulings sua sponte at any time prior to the entry of judgment. See *Le Francois v. Goel* (2005) 35 C4th 1094, 1107 and *Darling, Hall & Rae v. Kritt* (1999) 75 CA4th 1148, 1156–1157.

In the instant case, the Court previously ruled:

> . . . the exhibits attached to the First Amended Complaint were not inconsistent with its allegations. . . . Specifically, the Defendant had discretion to accept or reject a loan. (First Am. Complaint, Exhibit

A, "Correspondent Origination and Sales Agreement," Art. II, § 2.2.) The Court noted that the method of acceptance by Defendant was not stated in the attached exhibits and determined that to the extent that Defendant argued that the "Correspondent Lock Confirmation" was simply a lock in the interest rate, these allegations did not appear in the complaint. (*Aubry v. Tri-City Hosp. Dist.* (1992) 2 Cal.4th 962, 966-967.) In addition, per the terms of termination, when Defendant issued a rate and rate reservation period, the contract required Defendant to accept the assignment of the loan after certain conditions were met. (First Am. Complaint, Exhibit A, "Correspondent Origination and Sales Agreement," Art. VI.)

The Court believes that it should reconsider its prior ruling on the grounds that the document entitled "Correspondent Lock Confirmation" does appear to be a "sub-agreement" vis a vis the interest rate as opposed to an agreement to purchase the particular loan. As noted, Article VI of the "Correspondent Origination and Sales Agreement--Closed Loan Purchase" indicated that certain conditions had to be met before Defendant was required to accept a loan assignment. In *Barnett v. Fireman's Fund Ins. Co.* (2001) 90 CA4th 500, 505, the court stated: "(W)e rely on and accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits". In other words, the recitals in the exhibit controls over allegations in the body of the complaint that are inconsistent. See *Mission Oaks Ranch, Ltd. v. Santa Barbara* (1998) 65 C.A.4th 713, 720. However, the Court requests further briefing on the issue of construction of the exhibits and the issue of reconsideration.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling A.M. Simpson 6-21-10
Issued By: _____ _____on_____.
(Judge's initials) (Date)

Tentative Ruling

Re: ***Nelson v. Kingsley***
Superior Court Case No. 08CECG01976

Hearing Date: June 22, 2010 (**Dept. 97C**)

Motion: By plaintiff for contractual attorney's fees

Tentative Ruling:

To grant motion and to award fees of $7,552.50.

Explanation:

The court finds that plaintiff is the "prevailing party" in this action in that he recovered $18,183.97 in unpaid rent. However the court also finds that this amount could have been recovered in the unlawful detainer action (08CECL02997) filed two months earlier in which defendants stipulated to the landlord recovering possession of the property and the monetary issues were "reserved."

Under CCP §1033(a), the court has discretion to determine the amount of fees and costs it determines to be reasonable where the prevailing party recovers a judgment that could have been rendered in a limited civil case.

Here, the court finds that the fees incurred in connection with the UD action and the cancelled mediation ($4,101.25 and $530 respectively), as well as a portion of the fees incurred in preparing for trial, were reasonably necessary to recover the judgment obtained.

However the court will exercise its discretion to limit the amount allowed for trial preparation to $2,921.25 and will allow a total fee recovery of $7,552.50.

Pursuant to California Rules of Court, Rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **A.M. Simpson** (Judge's initials) **on** **6-14-10** (Date).

(20) **Tentative Ruling**

Re: ***County of Fresno v. Torres, et al.***
Superior Court Case No. 10CECG00842

Hearing Date: June 22, 2010 **(Dept. 97C)**

Motion: Motion for Prejudgment Possession

Tentative Ruling:

To grant. (CCP § 1255.410.)

Explanation:

Plaintiff County of Fresno makes a prima facie showing that it seeks to acquire easements and rights of way for a public use – in order make safety improvements to Academy Avenue. (CCP § 1240.010.) Plaintiff makes a prima facie showing that it seeks to condemn for compatible joint use property already devoted to public use. (CCP § 1240.510.) The County has adopted the required Resolution of Necessity. (Complaint ¶ 4; CCP § 1240.040.) On 3/8/2010 the County deposited with the clerk of the court the probable amount of compensation. (CCP § 1255.010.)

Defendant Jesus Torres was personally served with the summons, complaint, and moving papers on 3/24/2010, more than 30 days prior to the hearing date, and Defendant has filed no Opposition to the motion. Accordingly, the unopposed motion must be granted. (CCP § 1255.410(d).)

Pursuant to CRC Rule 3.1312(a) and CCP § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **A.M. Simpson** (Judge's initials) **on** **6-18-10** (Date).

(6)

Tentative Ruling

Re: ***In the Matter of Ana Mendoza/In the Matter of Georgio Ceballos***
Superior Court Case No. 09CECG03860

Hearing Date: June 22, 2010 (**Dept. 97A**)

Motion: Petitions to compromise minors' claim

Tentative Ruling:

To deny for lack of jurisdiction. Petitioner may file a verified amended petition that cures the defects listed below. Petitioner must obtain a new hearing date for the amended petition. (Super. Ct. Fresno County, Local Rules, rule 2.8.4.)

Explanation:

A petition to compromise a minor's claim may be filed only in the superior court of either of the following counties: (1) the county where the minor resides when the petition is filed; or (2) any county where suit on the claim or matter properly could be brought. (Prob. Code, §3500, subd. (b)(1), (2).)

Actions for personal injury are triable either in the county where the defendant resides or in the county where the injury occurred. (Code Civ. Proc., §395, subd. (a).)

The minors live in Strathmore, California, which is in Tulare County. Thus, Probate Code section 3500, subdivision (b)(1), does not apply.

The car accident occurred in Tulare County. Consequently, the lawsuit could not have been brought in Fresno County as the county where the injury occurred. (Prob. Code, §3500, subd. (b)(2); Code Civ. Proc., §395, subd. (a).)

No information is given as to what the county the other driver, Beverlee Joan Perry, resides. (Prob. Code, §3500, subd. (b)(2); Code Civ. Proc., §395, subd. (a).) If Ms. Perry is a Fresno resident, the amended petition must so state.

If Fresno County is not the proper venue, Petitioners must file in the proper county. (Prob. Code, §3500, subd. (b).)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary.

The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: AMC on June 18, 2010 .

(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Arenas v. Diaz***
Superior Court Case No. 09CECG02436

Hearing Date: June 22, 2010 (**Dept. 97A**)

Motion: Petition to compromise minor's claim

Tentative Ruling:

To grant. Order signed. Hearing off calendar.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: AMC on June 18, 2010 .
(Judge's initials) (Date)

Tentative Ruling

Re: ***Camargo, et al v. Columbia Park Estates LLC***
Superior Court Case No. 07CECG03351

Hearing Date: June 22, 2010 (**Dept. 97C**)

Motion: By defendant/cross-complainant for good faith settlement determination

Tentative Ruling:

To grant motion and find settlement to be in good faith.

Explanation:

The moving papers were served on the plaintiff as well as all non-settling defendants, even though none of them have yet "appeared" in this action, and no opposition has been filed.

Since the burden of showing a proposed settlement to be in bad faith is on any party opposing it [CCP §877.6(d)], and since no opposition has been filed, the court finds the proposed settlement to be in good faith, and the motion is therefore granted.

Pursuant to California Rules of Court, Rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **A.M. Simpson** (Judge's initials) **on** **6-18-10** (Date).

(6)

Tentative Ruling

Re: ***Olono v. Fresenius USA, Inc.***
Superior Court Case No.: 10CECG00994

Hearing Date: June 22, 2010 (**Dept. 97D**)

Motion: By Plaintiff Rose Olono for trial preference

Tentative Ruling:

To grant. The court will set a new trial date at the hearing.

Explanation:

Plaintiff has met her burden. (Code Civ. Proc., §36, subds. (a), (c)(2).)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DRF on 6-20-10 .
(Judge's initials) (Date)

Tentative Ruling

Re: ***Olmsted v. Children's Hospital of Central California, et al.***
Superior Court Case No. 08 CECG 00016 AMC

Hearing Date: June 22, 2010 (**Dept. 97 C**)

Motion: Plaintiff's Motion to Tax Costs Requested by Defendants Dr. Gerardi and CHCC.

Tentative Ruling:

To DENY both motions. (CRC 3.1700 (b).)

Explanation:

As a general rule, Defendants, as the prevailing parties, are entitled to recover their costs under CCP 1033.5 (**Baker-Hoey v. Lockheed Martin Corp.** (2003) 111 Cal.App.4th 592, 597.) Where a prevailing party files a cost memorandum with facially PROPER CHARGES, the verified memorandum is prima facie evidence that the costs, expense and services therein were necessarily incurred. The burden is on the party moving to tax costs to show they were not reasonable or necessary. (**Jones v. Dumrichob** (1998) 72 Cal.App.4th 111, 131.) But an item properly objected to is put in issue, and the burden of proof is on the party claiming them as costs. (**Ladas v. California State Automobile Association** (1993) 19 Cal.App.4th 761, 774-776.)

Plaintiff objects to Defendants' entire cost memoranda on the ground that the CCP 998 offers were unreasonable. But where, as here, the offeror obtained a judgment more favorable than the offer, the judgment constitutes prima facie evidence that the offer was reasonable and that the offeror is eligible for the costs specified in CCP 998. (**Elrod v. Oregon Cummins Diesel** (1987) 195 Cal.App.3d 692, 700.)

Here Plaintiff fails to carry his burden of proof to show that the CCP 998 offer was unreasonable. Plaintiff moves to strike Defendant CHCC's and Dr. Gerardi's request for expert witness costs on the ground that the CCP 998 offer by Defendants was not in good faith, because it was a nominal or token offer. Plaintiff merely asserts that the action was meritorious and supported by ample testimony from the two nurses and the plaintiff's expert.

Defendants argue correctly that Plaintiff has failed to make a prima facie showing that the CCP 998 offer was not made in good faith. Defendants cite authority for the proposition that even a nominal offer of a waiver of costs can be in good faith if the action lacks merit. (**Nelson v. Anderson** (1992) 72

Cal.App.4th 111, 134.) Defendants not that after deliberating for one hour, the jury returned a unanimous verdict in favor of Defendants. Defendants note that they called two expert witnesses in the field of orthopedic surgery. By way of contrast, nurse Lozano and nurse Ceppi-Rogulkin, called by Plaintiff, were not medical doctors and were not qualified to opine as to the standard of care of an orthopedic surgeon. Similarly, though Defendant fail to cite any deposition or trial testimony to this effect, nevertheless, Defendants allege that Plaintiff's expert Dr. Rosenzweig admitted he was not a pediatric surgeon and had never seen or treated Plaintiff's exact fracture pattern and that he had never heard of a Gillespie fracture until being sent medical literature by Plaintiff's counsel.

Pursuant to CRC 3.1312 (a) and CCP 1019.5 (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling **A.M. Simpson** **6-18-10**

Issued By: _____ **on** _____ **.**

(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Whitlock v. Chavez et al.***
Superior Court Case No. 08CECG02831

Hearing Date: June 22, 2010 **(Dept. 97C)**

Motion: Defendant Khamsaysoury's Motion for Deemed Admissions Order and to Compel Further Responses to Requests for Admissions and Form Interrogatories

Tentative Ruling:

To grant both motions. To deem admitted the truth of all matters specified in the request for admissions. (CCP § 2033.280(b).) Plaintiff shall provide a further amended verified response to Form Interrogatory, No. 17.1, within 10 days of service of the order by the clerk.

Defendant Khamsaysoury shall pay an additional filing fee of $40.00 to be due and payable to the court clerk within 30 days of service of the minute order by the clerk. (Gov. Code § 70617 (a).)

Explanation:

Requests for Admission

Plaintiff did not serve a response to Khamsaysoury's Request for Admissions, Set One by the response deadline, and thereafter served a response improperly asserting various objections. Failure to timely respond to RFAs results in waiver of all objections to the requests, including claims of privilege or work product protection. (CCP § 2033.280(a).) Though months have passed, plaintiff still has not provided a verification of the responses served. (Petrosyan Dec. ¶ 17.) Responses to requests for admissions must be signed under oath by the party to whom they are directed. (CCP § 2033.240(a).) An unverified response is tantamount to no response at all. (*Appleton v. Superior Court* (1988) 206 Cal.App.3d 632, 636.)

If a party fails to serve a timely response, the requesting party may move for an order that the truth of any matters specified in the requests be deemed admitted, as well as for monetary sanctions. (CCP § 2033.280(b).) This order must be made unless the party to whom the requests for admission have been directed has served, before the hearing, a proposed response that is in substantial compliance with Section 2033.220.

At this point, the court will grant the deemed admissions order, unless plaintiff serves a verified response without objections before the hearing. The

court must treat the unverified late responses as no response at all and order the matters specified in the requests deemed admitted.

The court also notes that the substance of the response is insufficient. In addition to asserting objections that clearly had been waived, plaintiff states in response to each request that he has not had the opportunity to discover facts and circumstances relating to the accident, and as a result, the request is premature and plaintiff lacks sufficient information to admit or deny the request, and therefore denies them all.

Each answer "shall be as complete and straightforward as the information reasonably available to the responding party permits." (CCP § 2033.220(a).) In lieu of admitting or denying the request, a party may respond by claiming inability (lack of sufficient information) to admit or deny the matter stated in the request. (CCP § 2033.220(c).)

But a party responding in this manner must also state that a reasonable inquiry was made to obtain sufficient information: i.e., "a reasonable inquiry concerning the matter in the particular request has been made, and that the information known or readily obtainable is insufficient to enable that party to admit the matter." (CCP § 2033.220(c).) Plaintiff's response includes no such assurance.

The responding party is required to undertake a "good faith" obligation to investigate sources reasonably available to him or her in formulating answers to requests for admission. (CCP § 2033.220(c).)

This action has been pending for almost two years, and plaintiff claims to have no information about the most basic facts of what occurred in the auto accident, or whether this defendant was negligent or is liable at all to plaintiff. And despite the representation that plaintiff has not had the opportunity to discover facts and circumstances relating to the accident, plaintiff has propounded a significant amount of discovery and taken the depositions of two defendants. (See Petrosyan Dec. ¶¶ 18, 19.) Plaintiff's response is clearly evasive and does not comply with the Discovery Act.

Form Interrogatories

At issue in this motion is Form Interrogatory No. 17.1, which seek facts, persons and documents for each RFA response that is not an unqualified admission. Plaintiff's initial response to each interrogatory objected on grounds that the interrogatory calls for a legal conclusion and an expert opinion, and that plaintiff has not formulated a definitive contention with respect to the subject matter of the interrogatory.

However, the response was not timely served, and therefore any objections were waived. (CCP § 2030.290(a).)

Plaintiff purported to provide an amended response to the form interrogatories on 4/7/2010. (Nunez Dec. ¶ 9.) However, it does not appear that this response was made in response to Khamsaysoury's form interrogatories. The supplemental response to Form Interrogatory 17.1 only addresses one of eight requests for admissions, and that response is completely unresponsive and nonsensical, providing only information about insurance that has nothing to do with Khamsaysoury's RFA No. 1.

The substance of the initial form interrogatory response to 17.1 are deficient for the same reasons discussed with respect to the request for admissions responses.

Each answer in the response must be "as complete and straightforward as the information reasonably available to the responding party permits. If an interrogatory cannot be answered completely, it shall be answered to the extent possible." (CCP § 2030.220(a),(b).) Plaintiff made no effort whatsoever to provide any information relating to the subject matter of the RFAs.

"If the responding party does not have personal knowledge sufficient to respond fully to an interrogatory, that party shall so state, but shall make a reasonable and good faith effort to obtain the information by inquiry to other natural persons or organizations, except where the information is equally available to the propounding party." (CCP § 2030.220(c).) Plaintiff's responses give no indication that any effort at all has been made to obtain the information. And as noted above, this action has been pending almost two years and plaintiff has propounded and received responses to various sets of written discovery from four defendants, as well as the depositions of defendants Goodman and Khamsaysoury. (Petrosyan Dec. ¶¶ 18, 19.) Plaintiff cannot stick his head in the sand and pretend he has no information at all justifying his filing this lawsuit against Khamsaysoury or about how this accident occurred.

Pursuant to CRC Rule 3.1312(a) and CCP § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **A.M. Simpson** (Judge's initials) **on** **6-18-10** (Date).

03

Tentative Ruling

Re: ***Lanas v. Hye Development Company, LLC***
Case No. 10 CE CG 00885

Hearing Date: June 22nd, 2010 (Dept. 97A)

Motion: Plaintiffs' Demurrer and Motion to Strike Defendants' Answer

Tentative Ruling:

To sustain the demurrer to the answer and grant the motion to strike the defendants' answer, with leave to amend. (CCP §§ 430.20(a); 435; 436.) Defendants shall file their first amended answer within 20 days of the date of service of this order. All new allegations shall be in **boldface**.

Explanation:

Defendants' answer fails to plead any facts to support the affirmative defenses. Therefore, it is subject to a demurrer. (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 384.)

In addition, the answer was improperly filed because it was submitted by the individual defendants *in pro per* not only on their own behalf, but also on behalf of the Rainwater Family Trust and Hye Development Company. Corporations cannot represent themselves *in pro per*, nor can an unlicensed person represent the interests of a corporation or estate. (*Hansen v. Hansen* (2003) 114 Cal.App.4th 618, 621-622; *Merco Construction Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 727, 729.) Therefore, the answer was not filed in conformity with the laws of this state, and it is subject to a motion to strike. (CCP §§ 435, 436.)

However, since defendants have now substituted in a licensed attorney to represent them, the court intends to grant leave to amend to file a new answer.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: _____AMC_____ on _____June 18, 2010_____.
(Judge's Initials) (Date)

(23)

Tentative Ruling

Re: ***State Farm Mutual Automobile Insurance Company v. Tou Xiong, et al.***
Superior Court Case No. 09 CECG 00980

Hearing Date: Tuesday, June 22, 2010 (**Dept. 97A**)

Motion: Plaintiff State Farm Mutual Automobile Insurance Company's Motion to Compel Deposition of Defendant Joe Xiong, and Request for Monetary Sanctions

Tentative Ruling:

To DENY Plaintiff's Motion to Compel Deposition of Defendant Joe Xiong. (Code of Civil Procedure § 2025.450.)

To DENY Plaintiff's Request for Monetary Sanctions.

Explanation:

On February 23, 2010, Plaintiff State Farm Mutual Automotive Insurance Company filed a motion to compel Defendant Joe Xiong's deposition when Xiong failed to appear at a deposition scheduled for February 1, 2010 after Plaintiff had properly served Xiong with a deposition notice on January 14, 2010. On April 15, 2010, the Court denied Plaintiff's motion to compel Defendant Xiong's deposition. Then, on May 10, 2010, Plaintiff filed this second motion to compel Defendant Xiong's deposition. This motion is also based on the deposition notice that Plaintiff timely served on Defendant on January 14, 2010 and Defendant's failure to appear at the February 1, 2010 deposition.

The Court must deny this second motion to compel Defendant's deposition based on the Defendant's failure to appear at his February 1, 2010 deposition because this second motion to compel deposition is not a proper motion for reconsideration or a properly renewed motion pursuant to Code of Civil Procedure § 1008(a) and (b). The Plaintiff's motion is not a proper motion for reconsideration because this motion was not filed within 10 days after the Court clerk served written notice of entry of the Court's order denying Plaintiff's first motion to compel Defendant's deposition as required by Code of Civil Procedure § 1008(a). Second, the Plaintiff's motion is not a properly renewed motion because the Plaintiff failed to file a declaration or affidavit showing what previous motion for the same order was filed, when the previous motion was made and to what judge, what order was made, and what "new or different facts, circumstances, or law" now exist justifying granting the motion as required by Code of Civil Procedure § 1008(b).

For these reasons, the Court denies the Plaintiff's motion to compel deposition of Joe Xiong with sanctions.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: **AMC** (Judge's initials) **on June 21, 2010** (Date).

Tentative Ruling

Re: ***Lopez, et al. v. McCollum et al.***
Superior Court Case No. 09 CECG 03603

Hearing Date: **Tues., June 22, 2010 (Dept. 97D)**

Motion: Defendant Asbury Fresno Imports LLC's Demurrer and Motion to Strike re: Second Amended Complaint

Tentative Ruling:

To treat Asbury's demurrer as motion for judgment on the pleadings and to SUSTAIN WITH LEAVE TO AMEND on all grounds stated in Asbury's moving papers.

In light of the **Morgan** case, cited below, the court finds sua sponte that its earlier ruling on Wachovia Dealers Services Inc.'s demurrer was in error as to the Second Cause of Action. So that demurrer is also SUSTAINED WITH LEAVE TO AMEND.

Plaintiffs shall have 10 calendar days' leave within which to file a Third Amended Complaint which corrects the defects noted below. All new allegations therein shall be set forth in **boldface** type. Time shall run from the clerk's service of the minute order.

Explanation:

Defendant Asbury argues that Thomas McCollum, an individual, is not the seller and that the actual seller is Asbury Fresno Imports LLC dba Mercedes-Benz of Fresno. They also note that Plaintiffs concede this point because on 12/21/09 Plaintiffs filed an Amendment to that effect. But in their SAC, Plaintiffs nevertheless incorrectly name Thomas McCollum as the seller. .

In their Opposition, Plaintiffs do not respond to this argument. Accordingly, the motion for judgment on the pleadings is SUSTAINED WITH LEAVE TO AMEND on this ground.

Defendant Asbury also moves to strike the Second Cause of Action for violation of the Consumers Legal Remedies Act. On 3/24/10, the court previously sustained Wachovia's demurrer to that same claim, WITHOUT LEAVE TO AMEND, on the ground that Plaintiffs had failed to comply with the Act's requirement that a pre-litigation demand be sent by certified mail at least 30 days before commencement of the action. According to federal trial court rulings,

which the court relied on, failure to comply with this requirement results in dismissal WITH PREJUDICE. (**Von Grabe v. Sprint PCS** (S.D. Cal. 2003) 312 F.Supp.2d 1285, 1304; **Cattie v. Wal-Mart Stores Inc.** (S.D. Cal. 2007) 504 F.Supp. 2d 939, 950.) But in light of **Morgan v. AT&T Wireless Services Inc.** (2009) 177 Cal. App. 4th 1235, 1260-1261, dismissal without prejudice is the correct ruling.

It is still unclear to the court whether in pursuing the Second Cause of Action under the CLRA, Plaintiffs are seeking only injunctive relief, or both injunctive relief and damages.

In their Third Amended Complaint, Plaintiffs shall specify clearly whether they are only seeking injunctive relief, or whether they are seeking both injunctive relief and damages. If Plaintiffs are seeking injunctive relief only, they need not show compliance with the 30-day notice requirement of Civil Code 1782. If Plaintiffs are seeking both injunctive relief and damages, then the Plaintiffs must allege facts showing that they complied with the notice requirements. And if Plaintiffs are seeking damages, they should specify whether they are seeking compensatory damages only, or both compensatory and punitive damages.

Plaintiffs argue correctly that it is too late for Defendant Asbury to bring a demurrer or motion to strike. However, as a practical matter, Defendant may still bring a motion for judgment on the pleadings, which has the same effect as a demurrer. As Plaintiffs appear to have a meritorious argument regarding the correctness of this court's prior ruling on Wachovia's demurrer to the Second Cause of Action, the court will treat Asbury's motion as a motion for judgment on the pleadings.

Pursuant to CRC Rule 3.1312(a) and CCP § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DRF on 6-20-10 .
(Judge's initials) (Date)

03

Tentative Ruling

Re: ***Conley v. The Island***
Case No. 09 CE CG 00295

Hearing Date: June 22nd, 2010 (Dept. 97D)

Motion: Defendants/Cross-Complainants/Cross-Defendants Lee Investments, LLC and Rexford Properties, LLC's Motion to Determine Good Faith Settlement

Tentative Ruling:

To grant the motion to determine that the settlement between plaintiff Diana Conley, Lee Investments, LLC, and Rexford Properties, LLC, is in good faith under CCP § 877.6. To grant the motion to dismiss the cross-claims against Lee and Rexford, with the exception of the express contractual indemnity claim, which is not covered by CCP § 877.6(c).

Explanation:

Under CCP § 877.6, "Any party to an action in which it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors, upon giving notice in the manner provided in subdivision (b) of Section 1005." (CCP § 877.6(a)(1).)

"The issue of the good faith of a settlement may be determined by the court on the basis of affidavits served with the notice of hearing, and any counter affidavits filed in response, or the court may, in its discretion, receive other evidence at the hearing." (CCP § 877.6(b).)

"A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault." (CCP § 877.6(c).)

"The party asserting the lack of good faith shall have the burden of proof on that issue." (CCP § 877.6(d).)

"[T]he intent and policies underlying section 877.6 require that a number of factors be taken into account including a rough approximation of plaintiffs' total recovery and the settlor's proportionate liability, the amount paid in settlement,

the allocation of settlement proceeds among plaintiffs, and a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial. Other relevant considerations include the financial conditions and insurance policy limits of settling defendants, as well as the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants. [Citation.] Finally, practical considerations obviously require that the evaluation be made on the basis of information available at the time of settlement. '[A] defendant's settlement figure must not be grossly disproportionate to what a reasonable person, at the time of the settlement, would estimate the settling defendant's liability to be.' [Citation.] The party asserting the lack of good faith, who has the burden of proof on that issue (§ 877.6, subd. (d)), should be permitted to demonstrate, if he can, that the settlement is so far 'out of the ballpark' in relation to these factors as to be inconsistent with the equitable objectives of the statute. Such a demonstration would establish that the proposed settlement was not a 'settlement made in good faith' within the terms of section 877.6. 7." (*Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499-500.)

In the present case, Lee and Rexford have settled with plaintiff for $760,000, which is apparently sufficient to cover plaintiff's future medical expenses. According to an independent expert hired by the parties during mediation, plaintiff's future medical expenses will be $201,617.92. (Jamison decl., ¶ 13, and Exhibit D thereto.) Thus, the amount of the settlement will cover all of plaintiff's future medical expenses with money left over to cover lost wage claims, attorney's fees, and non-economic damages, as well as settling the Workers' Compensation matter. In addition, plaintiff has already recovered over $900,00 from the Workers' Compensation insurer, plus $120,000 from the Los Angeles action, so the amount of the settlement appears to be reasonable.

Normally, the court would assess whether the settlement is a fair and reasonable amount in light of the settling defendants' proportionate share of the liability. (*Tech-Bilt, supra*, 38 Cal.3d at 499-500.) However, in the present case the situation is somewhat different, since only Lee and Rexford have been directly sued by plaintiff, and United and the other cross-defendants are not defendants in the underlying complaint. As a result, Lee and Rexford are the only parties directly liable to plaintiff, and their proportionate share of the liability is essentially 100%. Still, because United and the other cross-defendants have been brought into the case by Lee and Rexford's cross-complaint, they do have an interest in making sure that the settlement is fair and reasonable so that they are not liable for an excessive amount on the indemnity claims.

United has failed to show that Lee and Rexford's settlement with plaintiff is not reasonable in the circumstances, or that it was reached as a result of fraud or collusion. While United argues that it should not even be a party to the action because it was not sued directly by plaintiff and any claims that plaintiff may have had against it are now barred by the statute of limitations or res judicata, the

court has already rejected these arguments on demurrer. The fact remains that United is a party to the action, and its presence in the action as a cross-defendant rather than a defendant does not somehow make the settlement less reasonable. United has failed to point to any evidence that would tend to show that the settlement is not a reasonable amount in light of plaintiff's injuries and Lee and Rexford's liability for those injuries. Thus, United has not met its burden under CCP § 877.6(d) of showing a lack of good faith.

Nor has United pointed to any evidence of fraud or collusion in the making of the settlement. It appears that the settlement was entered into after arms' length negotiations, and United was actually invited to participate in the negotiations but refused to attend. United suggests that the settlement was somehow collusive because only Lee and Rexford have any liability to plaintiff. Yet United may be liable for indemnity if its own negligence caused the accident. In fact, United may actually benefit from the settlement, since the settlement will effectively cap United's potential liability to Lee and Rexford on the indemnity claim. Therefore, United has failed to establish that the settlement is prejudicial to it or the other cross-defendants, or that the settlement was the result of fraud or collusion by the settling parties.

The court therefore intends to approve the settlement as being in good faith and dismiss the implied and equitable indemnity cross-claims against Lee and Rexford. (CCP § 877.6(c).) However, the court intends to deny Lee and Rexford's motion to the extent that it seeks to dismiss the express contractual indemnity claim against Rexford. CCP § 877.6(c) applies only to "equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault." Express contractual indemnity claims are thus not covered by the statute, and should not be dismissed even if there is a good faith settlement. (*Bay Development Co. v. Superior Court* 50 Cal.3d 1012, 1031-1032; *Plant Insulation Co. v. Fibreboard Corp.* (1990) 224 Cal.App.3d 781, 790; *C. L. Peck Contractors v. Superior Court* (1984) 159 Cal.App.3d 828, 834.) "We hold that an indemnity claim against a codefendant based on express contract survives a good faith section 877.6 settlement. The Legislature, by specifying equitable comparative indemnity, evidenced its intention to exclude contractual indemnity. The language of section 877.6 is clear, and we are not free to depart from it." (*C.L. Peck Contractors v. Superior Court, supra,* 159 Cal.App.3d at 834.)

Lee and Rexford argue that the court should dismiss even the express contractual indemnity claim because the language of the express indemnity claim is not sufficiently specific to alert the indemnitor to the full scope of its obligation. (*Bay Development, supra*, 50 Cal.3d at 1033.) However, a brief review of the indemnity clause in the rental agreement shows that it clearly gives notice to the indemnitor that it will have to indemnify United for "any and all suits, actions, proceedings, claims, judgments or demands, costs and charges, legal expenses, damages and penalties resulting or claimed to result from injury or damage to

any and all persons, including wrongful death, and including employees of the customer or anyone else, and property damage, in any way arising out of or in any way connected with the items rented hereunder, by any person, including employees of United Rentals whether or not caused in part by the active or passive negligence or other fault of United Rentals or its officers or employees indemnified hereunder; provided, however, customer's duty hereunder shall not arise if such claims, suits or liability, injuries or death or other claims or suits, are caused by the sole negligence or willful misconduct of United Rentals or its officers or employees indemnified hereunder." (Exhibit C to Jamison decl., p. 2.)

Thus, the indemnity agreement clearly provides for indemnity for any injuries or damages, unless they are solely caused by United Rentals' own negligence or willful misconduct. As a result, the court cannot conclude that the express indemnity agreement is subject to section 877.6(c), and it declines to dismiss the express indemnity cross-claim. However, the court does intend to grant the motion to dismiss the other cross-claims.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: _____DRF_____ on ___6-20-10_____.

(Judge's Initials) (Date)

Tentative Ruling

Re: ***A. Toni Breadmont v. The Clarksfield Company and Ben Ewell, Jr.***
Case no. 10CECG00411

Hearing Date: **June 22, 2010 (Dept. 97C)**

Motion: By defendants to compel arbitration and stay the action

Tentative Ruling:

To grant pursuant to California Code of Civil Procedure (CCP) sections 1281, 1281.2, and 1281.4.

Explanation:

The court finds that there is sufficient consideration to support the subject arbitration agreement. California Civil Code (Civil Code) section 1614 provides that a written instrument is presumptive evidence of consideration. Civil Code section 1615 provides that the burden of proof of lacking consideration for an instrument lies with the party seeking to invalidate or avoid it. The doctrine of mutuality of obligation requires that the promises on each side be binding obligations in order to be consideration for each other. (1 Witkin, *Summary of Calif. Law* (10th ed. 2005) "Contracts," section 225.) There is mutuality of obligation; *i.e.*, mutual promises in the arbitration agreement, which makes it a bilateral contract. (*Bleecher v. Conte* (1981) 29 Ca.3d 345, 350; *Mattei v. Hopper* (1958) 51 Cal.2d 119, 122.) There is mutuality of obligation, and sufficient consideration.

The minimum procedural requirements in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 apply to discrimination in violation of the Fair Employment and Housing Act (FEHA) and nonstatutory public policy claims (*e.g.*, wrongful termination in violation of public policy. (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1076.) But, where the plaintiff asserts private rights the agreement to arbitrate those claims is tested only against conscionability standards. (*Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 652.) *Bohos v. Certain Underwriters at Lloyd's of London* (2005) Cal.4th 495, 506-508 declined to extend the reasoning of *Armendariz* and *Little* to cover dispute over arbitrability of disability insurance claim based on common law rather than violation of constitutional or statutory rights. In the present case plaintiff asserts causes of action that are based in common law, rather than a violation of FEHA or other constitutional or statutory rights. Thus, the standards that apply are whether the arbitration agreement is unconscionable. The court finds that it is not.

The court finds that the subject arbitration agreement is not invalid due to procedural or substantive unconscionability. *(Armendariz, supra,* 24 Cal.4th at 114.) Plaintiff had been an employee of the Clarksfield Company since 1971 when she signed the subject arbitration agreement in 2007. This employment history overcomes any aspects of unequal bargaining power which otherwise might render an arbitration agreement unconscionable. (*See Armendariz, supra,* 24 Cal.4th at 114.)

Defendants meet their burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence; and plaintiff fails to meet her evidentiary burden in proving no consideration or unconscionability. (*Higgins v. Superior Court* (2006) 140 Cal. App. 4th 1238, 1250, citing *Provencio v. WMA Securities, Inc.* (2005) 125 Cal.App.4th 1028, 1031.) California law favors enforcement of valid arbitration agreements. (*Id*. at 97.) Therefore, the court grants the petition. The court also stays the litigation. (*Twentieth Century Fox Film Corp. v. Sup.Ct. (Lottermoser)* (2000) 79 Cal.App.4th 188, 192.)

Pursuant to California Rules of Court rule 3.1312, and CCP section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **A.M. Simpson** **on** **6-21-10**.

(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***McClung et al. v. Whipple et al.***
Superior Court Case No. 09 CECG 03455

Hearing Date: June 22, 2010 **(Dept. 97A)**

Motion: Demurrer to the Second Amended Complaint

Tentative Ruling:

To continue the hearing to Wednesday, July 21, 2010 at 3:30 p.m. in Dept. 97A to allow for the submission of further briefing as specified infra. Supplemental briefing is to be submitted **simultaneously** on or before July 7, 2010. No replies or rebuttals will be permitted. Service on the other parties will be via fax or hand delivery.

To continue the CMC from July 6, 2010 to July 27, 2010 at 1:30 p.m. in Dept. 97E.

Explanation:

Plaintiff Andrea McClung was a U.S. Postal mail carrier and was on duty on July 14, 2008. While making a delivery at a residence owned by the Richter Defendants and occupied by the Whipple Defendants, she was attacked by four dogs belonging to the Whipple Defendants. She suffered severe injuries. She alleges that the dogs had previously attacked a 77-year-old woman a few weeks earlier and had attacked and killed a neighbor's dog two days before her attack. She further alleges that one or more of the dogs had been impounded on a previous occasion but no administrative hearing had been held to determine whether the animal was dangerous as set forth in Fresno County Ordinance Nos. 9.04.300 et seq.

On September 22, 2009 she and her husband filed a complaint. After the County filed a demurrer, they filed a First Amended Complaint on November 30, 2009. The County filed another demurrer on December 22, 2009. Opposition and a reply were filed. On March 10, 2010 the Court adopted the tentative ruling as the order of the Court and sustained the special demurrers for uncertainty to the ninth, tenth, eleventh, thirteenth and fourteenth causes of action with leave to amend. The general demurrers were rendered moot.

On April 1, 2010 the Plaintiff filed a Second Amended Complaint. It alleges eleven causes of action. Of these, the County is named as a Defendant as to the tenth cause of action (failure to discharge a mandatory duty pursuant to Cal. Gov. Code § 815.6) and the eleventh cause of action (violation of Gov. Code

§ 835). On April 30, 2010 the County filed general and special demurrers. Opposition and a reply were filed.

The Court notes that at issue is the interpretation of Fresno County Ordinance Nos. 9.04.300 et seq. In *Carson Harbor Village, Ltd. v. City of Carson Mobilehome Park Rental Review Bd*. (1999) 70 Cal.App.4th 281, 290 the court stated: "We interpret ordinances by the same rules applicable to statutes". See Amaral *v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1184 and *Zipperer v. County of Santa Clara* (2005) 133 Cal.App.4th 1013, 1023. The Court's fundamental task is to ascertain the Legislature's intent (or, as here, the Board of Supervisors' intent) and thereby effectuate the purpose of the ordinance. See *Smith v. Superior Court* (2006) 39 Cal.4th 77, 83. Accordingly, the Court invites supplemental briefing as to the history and intent of the Ordinance at issue and, if applicable, similar ordinances enacted in other counties. In addition, the Court invites supplemental briefing as to the legislative history and intent of Food & Agriculture Code Chapter 9 "Potentially Dangerous and Vicious Dogs".

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: AMC on June 18, 2010 .

(Judge's initials) (Date)

Tentative Ruling

(17)

Re: ***Utility Trailer Sales of Central Calif. v. Roberts Managing Contractors, Inc. et al.; and related cross-actions***
Superior Court Case No. 09 CECG 04060

Hearing Date: June 22, 2010 (Dept. 97D)

Motion: Mozaffari's Demurrer to Second Amended Complaint
Mozaffari's Motion to Strike Second Amended Complaint

Tentative Ruling:

To deny demurrers; to grant motion to strike.

Explanation:

Demurrer

A demurrer is made under Code of Civil Procedure section 430.10, and is used to test the legal sufficiency of the complaint or other pleading. (Weil & Brown, Civil *Procedure Before Trial* (Rutter Group 2009) "Attacking the Pleadings" § 7:5.) The demurrer admits the truth all material facts properly pleaded, but not mere contentions, deductions or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Failure to File a New Certificate of Merit

Code of Civil Procedure section 411.35 provides that an attorney filing an action alleging professional negligence against an architect, engineer or land surveyor shall also file a certificate declaring that the he or she has "reasonable and meritorious cause for the filing of [the] action." (Code Civ. Proc. §§ 411.35, subd., (a)(b).) Mozaffari contends that the entire Second Amended Complaint is subject to demurrer because no certificate was filed in conjunction with it.

Subdivision (g) of section 411.35 does provide that the failure to file a certificate in accordance with that section is grounds for a general demurrer or a motion to strike. However, subdivision (c) provides: "Where a certificate is required pursuant to this section, *only one certificate shall be filed*, notwithstanding that multiple defendants have been named in the complaint or may be named at a later time." (Emphasis added.) It is undisputed that a certificate was filed with the original complaint reflecting that plaintiff's counsel had consulted with an engineer who had concluded that Mozaffari was negligent. (See Plaintiff's Request for Judicial Notice, Exhibit 1.) If that certificate is sufficient for additional defendants not mentioned in the certificate under

subsection (c), then it should be sufficient under subdivision (c) against Mozaffari as against an amended complaint.

This ground for demurrer is overruled.

Sixteenth Cause of Action – Breach of Contract

On general demurrer, the court determines if the essential facts of any valid cause of action have been stated. (Weil & Brown, *supra*, § 7:39; *Gruenberg v. Aetna Ins. Co*. (1973) 9 Cal.3d 566, 572; Code Civ. Proc. § 430.10(e).) Leave to amend should be granted if there is a reasonable possibility that plaintiff could state a cause of action. (*Blank v. Kirwan*, *supra*, 39 Cal.3d at 318.)

"A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." (*Careau & Co. v. Security Pacific Business Credit, Inc*. (1990) 222 Cal. App. 3d 1371, 1388.) When a complaint is based on a written contract which it sets out in full, a general demurrer to the complaint admits not only the contents of the instrument but also any pleaded meaning to which the instrument is reasonably susceptible. (*Martinez v. Socoma Companies, Inc*. (1974) 11 Cal.3d 394, 400.)

Civil Code section 1559 states: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." In order to qualify as third party beneficiaries, plaintiff was required to plead and prove that the Mozaffari – PDA Contract (Exhibit 2) was made for its benefit. (*Schonfeld v. City of Vallejo* (1975) 50 Cal.App.3d 401, 420.) Mozaffari's argument is simple: plaintiff is neither a creditor or donee beneficiary of the Mozaffari – PDA contract. To qualify as a creditor beneficiary, "the promisor's performance of the contract will discharge some form of legal duty owed to the beneficiary by the promisee. [Citation.]" (*Martinez v. Socoma Companies, Inc*., *supra*, 11 Cal.3d at p. 400.) On the other hand, "A person is a donee beneficiary only if the promisee's contractual intent is either to make a gift to him or to confer on him a right against the promisor. [Citation.]" (Id. at pp. 400-401.) However, the term 'intended beneficiary' now covers all those included as donee and creditor beneficiaries. (See *Gilbert Financial Corp. v. Steelform Contracting Co*. (1978) 82 Cal.App.3d 65, 71 ['[T]he creditor-donee dichotomy as applied to third party beneficiaries is beginning to vanish. Although the two concepts are still viable, the specific descriptive words are being dropped by the courts and academicians to permit broader application of the doctrine']; *Outdoor Services v. Pabagold* (1986) 185 Cal.App.3d 676, 683; 1 Witkin, *Summary of Cal. Law* (10th ed. 2005) Contracts, § 687, pp. 773-774.)

A third party beneficiary may enforce a contract made for its benefit. (Civ. Code, § 1559.) To determine whether a contract was intended to benefit a third

person, one looks to the terms of the contract, using an "intent test." (*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1022.) Ascertaining this intent is a question of ordinary contract interpretation. (*Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 436.) Under long-standing contract law, a "contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636.) "[T]he intention of the parties is to be ascertained from the writing alone, if possible" (Civ. Code, § 1639.) "The interpretation of a written instrument, even though it involves what might properly be called questions of fact [citation], is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect. (See Civ. Code, § 1635-1661; Code Civ. Proc., § 1856- 1866.) . . . It is therefore solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence." (*Parsons v. Bristol Development Co*. (1965) 62 Cal.2d 861, 865.)

The intent test requires that the contracting parties "intended to confer a benefit on the third party." (*Spinks*, *supra*, 171 Cal.App.4th at p. 1022, citing *Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 348 [third party bears burden of proving contract was made to benefit it or its class].) Under the test, contract performance which causes an incidental benefit to a third party is of no consequence. (*Spinks*, *supra*, 171 Cal.App.4th at p. 1022 citing *Souza v. Westlands Water Dist*. (2006) 135 Cal.App.4th 879, 891.) "[I]t is not every contract for the benefit of a third person that is enforceable by the beneficiary. The fact that he is incidentally named in the contract, or that the contract, if carried out according to its terms, would inure to his benefit, is not sufficient to entitle him to demand its fulfillment. It must appear to have been the intention of the parties to secure to him personally the benefit of its provisions." (*Walters v. Calderon* (1972) 25 Cal.App.3d 863, 870-871; italics added.)

The Addendum to the Agreement for Structural Engineering Services references the “Utility Trailer Sales/Fresno” project. It is apparent that Utility Trailer is the owner of the project, not PDA, the architect. The parties must have intended to provide services to benefit Utility Trailers, the owner of the project. This was not a building project for speculation. Utility Trailers is a third party beneficiary of the contract. (*Gilbert Financial Corp. v. Steelform Contracting Co.* (1978) 82 Cal.App.3d 65, 69-71.)

Twenty Second Cause of Action – Negligence

To prevail in an action for negligence, a plaintiff must plead and prove the following essential elements: (1) defendant's legal duty of care; (2) defendant's breach of duty (i.e., the negligent act or omission); (3) the breach was a proximate or legal cause of her injury (i.e., causation); and (4) damages. (*Ann M.*

v. Pacific Plaza Shopping Center (1993) 6 Cal.4th 666, 673.) Mozaffari claims there is no duty owed to plaintiff.

" 'The threshold element in a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion. [Citations.] Whether this essential prerequisite to a negligence cause of action has been satisfied in a particular case is a question of law to be resolved by the court.' [Citations.]" (*Artiglio v. Corning Inc*. (1998) 18 Cal.4th 604, 614.) A duty of care may arise through statute, contract, the general character of the activity, or the relationship between the parties. (*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 803.) Mozaffari claims there is no contract between it and plaintiff, no statute obligating it to plaintiff and no special relationship between it and plaintiff.

In the context of claims based on pure negligence in providing professional services, liability is primarily confined to the client, i.e., the person who contracts for the professional services. (*Bily v. Arthur Young & Co*. (1992) 3 Cal.4th 370, 406.) Nevertheless, courts may impose a duty to in the absence of privity of contract under two circumstances. First, recovery may be permitted for an injured party who is an intended beneficiary of a contract between the defendant and another party. (*Ratcliff Architects v. Vanir Construction Management, Inc*. (2001) 88 Cal.App.4th 595, 605.) Alternatively, where a "special relationship" exists between parties not in privity, a plaintiff may recover for economic loss attributable to the negligent performance of a contract. (*J'Aire Corp. v. Gregory*, *supra*, 24 Cal.3d at p. 804.)

As set forth above, plaintiff is an intended beneficiary of the Agreement between PDA and Mozaffari.

Motion to Strike

Mozaffari asserts there is no contract that supports a claim for attorney's fees. Plaintiff contends that because it is a third party beneficiary of the Mozaffari-PDA contract, it can recover attorney's fees based on that contract.

The contract at issue states:

> Should litigation occur between the two parties relating to this provisions of this Agreement, all expenses, collection expenses, witness fees, court costs, and attorney's fees shall be paid by the non-prevailing party to the prevailing party.
>
> (Exhibit 2 to SAC, pg. 41.)

" '[I]n cases involving nonsignatories to a contract with an attorney fee provision, the following rule may be distilled from the applicable cases: A party is entitled to

recover its attorney fees pursuant to a contractual provision only when the party would have been liable for the fees of the opposing party if the opposing party had prevailed.' (*Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, 382 [30 Cal. Rptr. 2d 536] [involving a nonsignatory plaintiff suing a signatory defendant in an action on the contract].)" (*Dell Merk, Inc. v. Franzia* (2005) 132 Cal.App.4th 443, 450.)

In *Sessions Payroll Management, Inc. v. Noble Construction Co*. (2000) 84 Cal.App.4th 671, a contract between a general contractor and a subcontractor included an attorney fee clause. The subcontractor hired the plaintiff to provide payroll services. When the general contractor breached its agreement with the subcontractor, the plaintiff sued the general contractor for breach of contract and attorney fees. The trial court sustained a demurrer without leave to amend and awarded attorney fees to the general contractor. (*Sessions Payroll*, *supra*, 84 Cal.App.4th at pp. 674–677.)

The appellate court reversed because the underlying contract gave no indication the general contractor and the subcontractor intended to benefit the plaintiff by including it within the attorney fee clause. The contract stated it did not confer or create any rights or benefits upon third parties except as expressly stated. The attorney fee clause did not so expressly state. It applied in the event " 'it becomes necessary for either party to enforce' " the contract's provisions. (*Sessions Payroll*, *supra*, 84 Cal.App.4th at pp. 680–681, original italics.) Thus, since the plaintiff could not have recovered fees had it won its breach of contract claim, the subcontractor could also not collect fees for successfully defending against that claim.

The court in *Loduca v. Polyzos* (2007) 153 Cal.App.4th 334 applied Sessions Payroll to the facts before it. In *Loduca*, the homeowner brought suit as a third party beneficiary for breach of the contract between the subcontractor and the general contractor. An attorney fee clause in the contract between the subcontractor and the general contractor provided that if a court action was brought, the prevailing party would be awarded attorney fees and collection costs. The trial court determined that the owner was an intended third party beneficiary within the meaning of Civ. Code, § 1559 and awarded attorney's fees pursuant to the subcontract. The appellate court noted that the subcontractor and the general contractor both understood the owner to be the only intended beneficiary who could enforce the contract. The broad language of the attorney fee clause in the case extended to any court action on the contract without reference to who brought it. (*Id*. at p. 344.)

Here, the clause is not broad, but very narrow, applying to litigation "between the two parties." This expressly excludes third party beneficiaries from the attorney's fee clause. The court strikes the claim for attorney's fees.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DRF on 6-20-10 .
(Judge's initials) (Date)